

No. 86130-7

SUPREME COURT OF THE STATE OF WASHINGTON

VANESSA CONDON, Petitioner,
v.
FELY CONDON, Respondent.

MOTION FOR DISCRETIONARY REVIEW

AS AMENDED

Gordon Arthur Woodley

Attorney for Petitioner

Woodley Law

14929 SE Allen Road

Bellevue, WA 98006

(425) 453-2000

WSBA # 7783

CLERK
2011 JUL -5 AM 8:06
3

A. IDENTITY OF PETITIONER

Vanessa Condon asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

The decision, compelling new obligations upon a former party, was entered on May 13, 2011, after the case had already dismissed with prejudice. The Kitsap County Superior Court decision imposed indemnification, hold harmless, and release obligations which were never part of the CR 2A agreement. The decision ordered the former party to sign a new agreement against her will or that it would be deemed signed. A copy of the decision is in the Appendix at pages A-1 through 5.

C. ISSUES PRESENTED FOR REVIEW

May a former party be compelled to assume new financial burdens, which were never agreed to and never part of the CR 2A settlement, after the case had been dismissed with prejudice ?

Does a Superior Court judge have authority post-dismissal to forcibly order a former party to enter into a new agreement?

After the case is already dismissed, should a Superior Court judge

force new obligations upon a former party and deem the new document signed, all against the will of that former party ?

D. STATEMENT OF THE CASE

On March 29, 2011, the CR 2A agreement was placed on the record; the personal injury claims were settled and the parties agreed that the case would be dismissed with prejudice and without costs. Petitioner's counsel signed the stipulated order of dismissal which was promptly submitted by respondent for entry. A-6.

After the case was dismissed, respondent asked the Kitsap County Superior Court to compel petitioner to assume additional obligations which were never part of the CR 2A settlement; respondent asked the Superior Court to impose indemnification and hold harmless obligations upon petitioner and to force the release of unknown claims and non-party entities. Petitioner did not agree to assume these new burdens. A-9.

On May 13, 2011, petitioner was ordered to sign respondent's post-dismissal proposal imposing these new obligations and financial burdens or it would be "deemed signed by entry of this Order". A-1. A timely Notice of Discretionary Review was brought on June 10, 2011. A-14.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review because the superior court has committed probable error and the May 13, 2011 decision of the superior court substantially alters the status quo, RAP 2.3(b)(2). The superior court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court. RAP 2.3(b)(3).

The accepted and usual course of judicial proceedings is that the case is ended once there is a settlement, a CR 2A agreement is presented to the court on the record, and the stipulated order of dismissal with prejudice is entered. Petitioner has not located any Washington law approving the superior court imposing additional burdens on a former party after the case has already been dismissed. The superior court's departure from the usual, accepted course is underscored by the lack of any Washington precedent approving such a departure. RAP 2.3(b)(3).

By saddling the petitioner with new obligations which were not agreed to and by deeming her assumption of these burdens, without her consent and after the case is over, the superior court dramatically altered the status quo and committed probable error. RAP 2.3(b)(2). The superior court should have upheld the integrity of the CR 2A agreement which was stated

on the record in open court and approved by the Judge. The parties are entitled to rely on the finality of that CR 2A agreement and respondent was without authority to seek additional conditions after the case was dismissed. *See Thurston v. Godsil*, 117 Wn App 1070 (Division One, 2003). There should not have been any change in the status quo of a case that had already been dismissed with prejudice.

Courts are not in the business of rewriting agreements, *Seattle-First National Bank v. Earl*, 17 Wn.App. 830,835, 565 P.2d 1215 (1977) (“It is a longstanding rule that courts cannot, and ought not, make a contract for the parties which they did not make for themselves or impose upon one party an obligation which was not assumed.”); courts may not force additional, unassumed burdens on a party, especially where the case has already ended with dismissal.

Contrary to the title of its proposed Order, respondent was not “enforcing” the terms of the parties’ CR 2A settlement, but rather was urging the court to compel and impose additional new burdens that petitioner never agreed to and was in no financial position to carry out. Indemnification can be an expensive process, as can delivering on a promise to hold another party harmless against outside claims. These

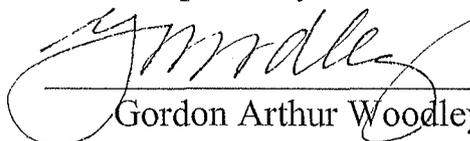
burdens were erroneously imposed upon petitioner against her will, without precedent, without proper consideration for the petitioner's contractual and constitutional rights, and without recognition that the status quo was dramatically altered by the superior court's post-dismissal decision. Probable error is evident. RAP 2.3(b)(2) and (b)(3).

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and should return the parties to the status quo ante May 13, 2011 by vacating the superior court's post-dismissal order and removing the new burdens and obligations imposed by this unprecedented decision.

July 1, 2011

Respectfully submitted,



Gordon Arthur Woodley
Attorney for Petitioner Vanessa Condon

APPENDIX

Decision of May 13, 2011 with attachment	A-1 through A-5
March 29, 2011 Stipulation and Order of Dismissal entered April 1, 2011	A-6 through A-7
May 10, 2011 Declaration of Gordon Woodley without attachments	A-8 through A-13
June 10, 2011 Notice of Discretionary Review	A-14

RECEIVED FOR FILING
KITSAP COUNTY CLERK

MAY 13 2011

DAVID W. PETERSON

WALL LIEBERT & LUND
MAY 13 2011

SUPERIOR COURT OF WASHINGTON
FOR KITSAP COUNTY

VANESSA CONDON,

Plaintiff,

NO. 05-2-02872-8

vs.

ORDER ENFORCING SETTLEMENT

FELY CONDON,

Defendant.

This matter having come before the Court on Defendants' Motion to Enforce settlement, and the Court, having reviewed the files and records herein, the declarations in support of the motion, and being fully advised in the premises, it is, therefore

ORDERED as follows:

1. Defendant's Motion is GRANTED;

It IS FURTHER ORDERED as follows:

1. Plaintiff will sign the Receipt and Release submitted by Defendant, and which is attached to this Order. In the event that Plaintiff does not sign the release, it is hereby deemed signed by the entry of this ORDER;

2. Upon signing of the Receipt and Release or entry of this Order, Defendant will pay the \$100,000.00 settlement to Plaintiff's counsel by check.

ORDER ENFORCING SETTLEMENT - 1

WALL LIEBERT & LUND P.S.
1521 SE PIPERBERRY WAY, SUITE 102
PORT ORCHARD, WA 98366
TEL: 360.876.1214 FAX: 360.876.1216

COPY

A-1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED this _____ day of May, 2011.

S/ THEODORE SPEARMAN
SUPERIOR COURT JUDGE

PRESENTED BY:
WALL LIEBERT & LUND P.S.

GREGORY J. WALL
WSBA 8604
Attorney for Defendant

COPY RECEIVED AND NOTICE OF
PRESENTATION WAIVED:

Gordon Woodley
WSBA 7783
Attorney for Plaintiff

A-2

RELEASE OF ALL CLAIMS

FOR AND IN CONSIDERATION of the payment to me at this time of the sum of ONE HUNDRED THOUSAND and 00 /100 DOLLARS (\$100,000.00), the receipt of which is hereby acknowledged, I, VANESSA CONDON CALVERLY, being of lawful age, do hereby and release, acquit and forever discharge FELY CONDON and GEORGE CONDON, individually and as the marital community comprised thereof, their heirs, assigns, successors and underwriters, and any other persons, firms, insurers and corporations who might be liable of and from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses and compensation, on account of, or in any way growing out of, any and all known and unknown claims for bodily injury, medical expenses, loss of business, business interruption, lost profits, wages, attorney fees or personal injury of any kind resulting or to result from the alleged injury of AUGUST 24, 1996, and which is the subject of a lawsuit entitled: *VANESSA CONDON v. FELY CONDON*, Kitsap County Cause No. 05-2-02872-8.

I hereby declare and represent that, in making this release and agreement it is understood and agreed that I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of the alleged injuries and damages, and that I have not been influenced to any extent whatever in making this release by any representations or statements regarding said injuries, or regarding any other matters, made by the persons, firms or corporations who are hereby released, or by any person or persons representing him or them.

I, VANESSA CONDON CALVERLY, being of lawful age, do hereby covenant and agree, in consideration of the sums named above, to hold harmless and indemnify FELY CONDON and GEORGE CONDON, individually and as the marital community comprised thereof,, their heirs, assigns, successors and insurance underwriters from all claims, suits or

RECEIPT AND RELEASE

PAGE - 1

A-3

proceeding for collection regardless of the merit of those claims, suits or proceedings for collection, which arise out of, or are in any way connected to the accident of AUGUST 24, 1996, which is the subject of this release.

INDEMNIFICATION FOR LIENS: The undersigned acknowledges that all subrogation or lien claims arising out of contract or under state or federal law, including but not limited to, any subrogation or lien claims of the undersigned's health-care providers, liens pursuant to RCW 60.44, RCW 74.09, insurance carriers, the Department of Labor and Industries, the Department of Social and Health Services, and any federal agency or programs such as Medicare, TriCare, Medicaid, Veteran's Administration or workers' compensation program, are the sole and separate obligation of the undersigned which undersigned agrees to pay or otherwise resolve, including specifically any and all repayment obligations owed to Medicare, TriCare, Medicaid or SCHIP. The undersigned, in consideration of FARMERS INSURANCE COMPANY tendering the settlement check directly to releasor's attorney, without naming lien holders as payees, further hereby covenants to defend, to indemnify, and hold harmless FARMERS INSURANCE COMPANY, its attorneys, agents, employees and assigns from and against all such lien and subrogation claims, including all costs and attorney's fees incurred in the defense of such claims. FARMERS INSURANCE COMPANY retains the right to monitor the defense of any such claims or action.

This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.

I further state that I have carefully read the foregoing release and know the contents thereof, and I sign the same as my own free act.

DATED this _____ day of March 2011.

VANESSA CONDON CALVERLY

SUBSCRIBED AND SWORN to before me this _____ day of _____ 2011.

NOTARY PUBLIC in and for the State of
Washington, residing at
My Commission expires

It is a crime to knowingly provide false, incomplete, or misleading information to an insurance company for the purpose of defrauding the company. Penalties include imprisonment, fines, and denial of insurance benefits.

RECEIVED FOR FILING
KITSAP COUNTY CLERK

APR 01 2011

DAVID W. PETERSON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

VANESSA CONDON,
Plaintiff,

NO. 05-2-02872-8

vs.

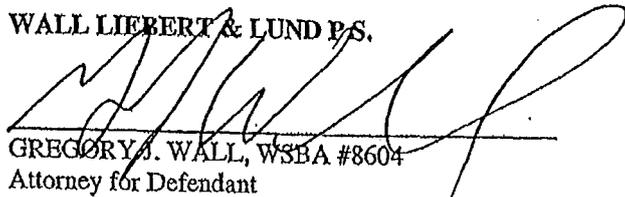
STIPULATION AND ORDER OF
DISMISSAL

FELY CONDON,
Defendant.

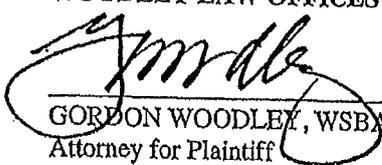
IT IS HEREBY STIPULATED by and between the parties hereto through their undersigned counsel of record, that the above-entitled case as between Plaintiff VANESSA CONDON, and Defendant FELY CONDON, has been fully compromised and settled and should be dismissed with prejudice and without cost to any party.

DATED this 29th of March 2011.

WALL LIEBERT & LUND P.S.


GREGORY J. WALL, WSBA #8604
Attorney for Defendant

WOODLEY LAW OFFICES


GORDON WOODLEY, WSBA #7783
Attorney for Plaintiff

STIPULATION AND ORDER OF DISMISSAL -1

WALL LIEBERT & LUND P.S.
1521 SE PIPERBERRY WAY, SUITE 102
PORT ORCHARD, WA 98366
TEL: 360.876.1214 FAX: 360.876.1216

A-6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORDER

Based upon the foregoing stipulation it is hereby,

ORDERED that the above-entitled cause as against Defendant FELY CONDON be and it is hereby DISMISSED with prejudice and without cost.

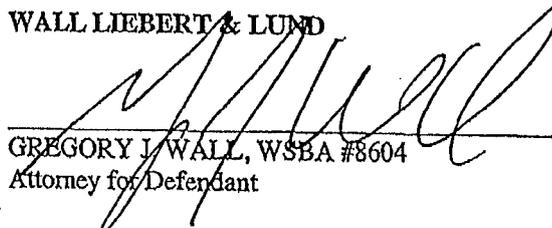
DONE IN OPEN COURT this ~~27~~¹ day of ~~March~~^{April} 2011.

LEILA MILLS

JUDGE/COURT COMMISSIONER

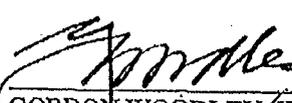
Presented by:

WALL LIEBERT & LUND


GREGORY I. WALL, WSBA #8604
Attorney for Defendant

Copy Received.
Notice of Presentation Waived:

WOODLEY LAW OFFICES


GORDON WOODLEY, WSBA #7783
Attorney for Plaintiff

A-7

The Honorable Ted Spearman
Compelling Release, Indemnification,
and Hold Harmless Clauses
After Dismissal With Prejudice
Friday, May 13, 2011 1:30 pm

IN THE SUPERIOR COURT FOR KITSAP COUNTY
STATE OF WASHINGTON

VANESSA CONDON,)	No. 05-2-02872-8
Plaintiff,)	
)	DECLARATION OF
)	GORDON WOODLEY
v.)	
FELY CONDON,)	
Defendant.)	
_____)	

I, GORDON WOODLEY, under penalty of perjury, make the following declaration:

1. I am an attorney continuously licensed to practice law in the state of Washington since 1977 and I am otherwise competent to make this declaration. I am counsel for Vanessa Condon herein.

A-8

2. Vanessa Condon never agreed to sign a release of known and unknown claims. She never agreed to sign an agreement to hold Farmers harmless against all claims and she never agreed to sign any agreement to indemnify Farmers. Yet, Farmers is now demanding all three of these agreements, after the case had already been dismissed by the Court with prejudice in March 2011, while Farmers refuses to pay the agreed-upon \$100,000 settlement.
3. Vanessa Condon fully complied with each of the three conditions of settlement [that she compromise her claims for payment of \$100,000, that she put the settlement on the record, and that she agree to the entry of a signed stipulated order of dismissal with prejudice and without costs]. There were no fourth, fifth and sixth conditions which Farmers now seeks to impose post-settlement post-dismissal.
4. There is no known case law in Washington that would permit Farmers to have the Court rewrite the terms of its settlement after the case is dismissed with prejudice.
5. Judge Spearman, in his initial ruling on Farmers' request to

impose additional post-facto conditions of settlement, read from a 2005 California case suggesting that such a result is not repugnant to basic notions of fairness and the integrity of the parties' contract.

6. We have not been able to obtain a copy of this case and all efforts to have the Court provide the case or the case citation have been unsuccessful. Attached as Exhibit A are true copies of emails to the Judge's law clerk requesting the case or case citation. It was first disclosed in this email exchange that the 2005 California case was an unpublished opinion.
7. In his oral ruling on April 22, 2011, Judge Spearman said that he would deem signed a simple, general release of known claims and asked the parties to present such a release [regardless of their stipulation and the dismissal entered with prejudice].
8. Attached as Exhibit B is a release which complies with the Court's ruling. It is Farmers' new release, hold harmless, and indemnification agreements cut down to just what the Court ordered: Vanessa Condon releases only the defendant Fely

Condon from known personal injury claims arising out of the August 24, 1996 collision which was the subject of this lawsuit before it was dismissed with prejudice. There is no release of unknown claims. There is no release of bad faith insurance claims. There is no hold harmless agreement. And there is no agreement whereby Vanessa indemnifies Farmers.

9. Since Farmers has never established that any release of Fely Condon was ever part of the agreed-upon settlement of the personal injury claims, no release should be compelled post-facto. The parties should abide by their agreed-upon settlement which was put on the record before the Court in March 2011 and which led to the Court entering the Order of Dismissal with Prejudice the next day. The March 29, 2011 CR 2A Stipulation should be enforced as entered, without adding new conditions or requirements. Since Farmers did not make signing a release a condition of settlement which was put on the record, the parties should be left with their agreement without interference or unilateral post-facto amendment.

10. The Court should be enforcing the terms of the settlement which the parties put on the record, rather than demanding that the parties rewrite the settlement and supplement the terms of the parties' stated agreement. Farmers is now insisting on overly broad release language, hold harmless agreement, and indemnification agreements for which Farmers never obtained agreement and never paid for. There is no new consideration for the newly compelled release, indemnification, and hold harmless agreements.
11. The Court's unilateral assistance to Farmers sets a bad precedent and upends CR 2A and long-standing Washington case law that the courts are not in the business of rewriting agreements made by parties. It is manifestly unjust to aid Farmers in this way, especially after Vanessa Condon had already fully performed all three conditions of her settlement with Farmers and its insured, her mother Fely Condon, whose clearly negligent driving caused her daughter's substantial head and facial injuries.
12. The Court should reconsider its oral ruling which is not

supported by Washington law, which encourages insurers to require post-dismissal conditions, and which further delays the payment of the settlement monies to the injured person and deprives that person of the use value of those monies for every day those monies are withheld from her. The Court should deny the imposition of new conditions to the March 29, 2011 CR 2A settlement and should require Farmers to pay interest on the amount of the settlement from the date of settlement until the funds are fully paid.

Dated this 10th day of May, 2011.



GORDON WOODLEY, WSBA 7783
Attorney for Plaintiff Vanessa Condon

JUN 10 2011

DAVID W. PETERSON

return (with circled 'e')

SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

VANESSA CONDON,)
Plaintiff,)
vs.)
FELY CONDON,)
Defendant.)

No. 05-2-02872-8

**NOTICE FOR
DISCRETIONARY REVIEW
TO SUPREME COURT**

Vanessa Condon, plaintiff, seeks review by the designated appellate court of the Order Enforcing Settlement entered on May 13, 2011.

A copy of the decision is attached to this notice.

June 8, 2011.

Gordon A. Woodley

Gordon A. Woodley, WSBA 7783
Attorney for Plaintiff

Gordon A. Woodley
Woodley Law
14929 SE Allen Road
Bellevue, WA 98006
425-453-2000
WSBA 7783

Gregory J. Wall
Wall, Liebert & Lund
1521 Piperberry Way, Suite 102
Port Orchard, WA 98366
360-876-1214
WSBA 8604

A-14

STATE OF WASHINGTON
2011 JUL -6 AM 8:06
CLERK

No. 86130-7

SUPREME COURT OF THE STATE OF WASHINGTON

VANESSA CONDON, Petitioner,
v.
FELY CONDON, Respondent.

PROOF OF SERVICE

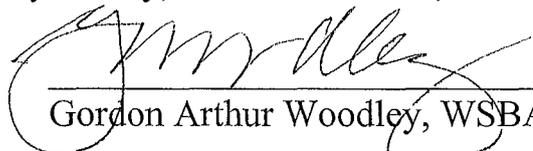
Gordon Arthur Woodley
Attorney for Petitioner

Woodley Law
14929 SE Allen Road
Bellevue, WA 98006
(425) 453-2000
Washington State Bar Association 7783

I, GORDON ARTHUR WOODLEY, declare under penalty of perjury that the following statements are true and correct:

1. I am the attorney for petitioner Vanessa Condon in this matter and make this declaration from personal knowledge.
2. On July 5, 2011, I placed the Motion for Discretionary Review As Amended and this Proof of Service for filing and service with the Clerk of the Supreme Court by posting the same in the United States Postal Service and for service upon opposing counsel by emailing and faxing the same to Mr. Wall at 360-876-1216.

Declared this 5th day of July, 2011 at Bellevue, Washington


Gordon Arthur Woodley, WSBA 7783